

OFFICE OF THE ATTORNEY GENERAL



92-00327

JIMMY EVANS
ATTORNEY GENERAL
STATE OF ALABAMA

JUN 16 1992

ALABAMA STATE HOUSE
11 SOUTH UNION STREET
MONTGOMERY, ALABAMA 36130
AREA (205) 242-7300

Honorable Harry D'Olive
Probate Judge
Baldwin County
Bay Minette, Alabama 36507

Probate Judges - Sales Tax -
Audits - Examiners of Accounts -
Revenue Department

Probate judge does not engage in
business of selling tangible
personal property and therefore
is not subject to sales and use
tax imposed under § 40-23-2.
Probate judge is subject to
oversight by the Department of
Revenue respecting his duties in
tax matters.

Dear Judge D'Olive:

This opinion is issued in response to your request for an
opinion from the Attorney General.

QUESTION

Is a judge of probate a taxpayer as defined
by Title 40-23-1(7) and therefore, as such
taxpayer, subject to audit by the sales tax
division of the State Department of Revenue?

FACTS, LAW AND ANALYSIS

Section 40-23-1(7), Code of Alabama 1975, defines the term
"taxpayer" as "any person liable for taxes hereunder." As this

definition appears in the chapter which provides for sales and use taxes, it is clear that this refers to taxpayers under the sales and use tax provisions of the Revenue Code. Such taxes are levied:

" . . . upon every person, firm or corporation, (including the State of Alabama and its alcoholic beverage control board in the sale of alcoholic beverages of all kinds, the University of Alabama, Auburn University and other institutions of higher learning in this state, whether such institutions be denominational, state, county or municipal institutions, any association or other agency or instrumentality of such institutions) engaged or continuing within this state, in business of selling at retail any tangible personal property whatsoever, including merchandise and commodities of every kind and character . . ." Section 40-23-2, Code, supra.

Under § 40-23-1(11), the term "business" is defined as follows:

"All activities engaged in, or caused to be engaged in, with the object of gain, profit, benefit or advantage, either direct or indirect, and not accepting sub-activities producing marketable commodities used or consumed in the main business activity, each of which sub-activity shall be considered business engaged in, taxable in the class in which it falls." (Emphasis supplied.)

The probate court is a constitutional office of the State of Alabama. See § 152 of the 1901 Constitution of Alabama as amended by Amendment No. 328 and 364. The person filling the office of the probate court is styled the probate judge, and has only such duties and jurisdiction as are specified by statute.

The "business" of the probate court, and the probate judge, qua probate judge, does not involve the sale of tangible personal property with the object of gain, profit, benefit or advantage, either direct or indirect. Thus, a probate judge functioning within the parameters of this jurisdiction would

not be subject to audit as a taxpayer by the sales tax division of the State Department of Revenue. This does not mean that the person holding the office of probate judge may, in his private person, engage in business activities which would otherwise be subject to sales tax and thereby avoid an audit of that business.

We are aware that the probate judge is charged with the responsibility of requiring proof of payment of the tax levied under § 40-23-101, Code, pursuant to § 40-23-104, Code, and may be required to collect said tax under the terms of § 40-23-100, Code, depending upon local laws and regulations.

Section 40-2-11(6) grants authority to the Department of Revenue to require any public official in the State to report information as to the collections of taxes and such other information as may be needful in the work of the Department of Revenue. Section 40-2-11(10) gives authority to the Commissioner of Revenue or his agents to visit the several counties in the State for the purpose of investigating the work and methods of taxing officials, including probate judges, charged with the duty of administering the tax laws of the State. When taken together, these provisions must be read to include authority by the Department of Revenue to examine the records of the probate judges for the purpose of ensuring that the tax laws are being properly administered.

Sections 40-2-11(3), (4), and (5) grant the Department of Revenue to confer with officials charged with a duty to collect taxes and, in the event any such official should fail or refuse to perform the duties required of such official by the tax laws of this State, the Department may refer its findings respecting the same to the Department of Examiners of Public Accounts, which may charge the official for any losses to the public treasury, or to the State Comptroller for action under § 40-1-40, Code of Alabama 1975.

CONCLUSION

The probate court, and the probate judge, qua probate judge, does not engage in the business of selling tangible personal property with the object of gain, profit or benefit or advantage, either direct or indirect, and therefore is not subject to the sales and use tax imposed under § 40-23-2. However, a probate judge charged with statutory duties with regard to taxes is subject to the oversight of the Department of Revenue with regard to such matters. In order to properly

Honorable Harry D'Olive
Page 4

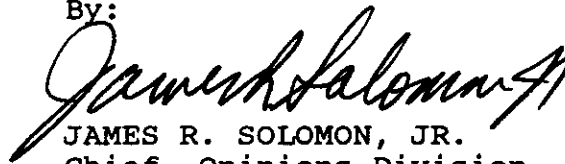
exercise its duties, the Department of Revenue may examine the records of the probate judge relating to tax matters.

I hope this sufficiently answers your question. If our office can be of further assistance, please do not hesitate to contact us.

Sincerely,

JIMMY EVANS
Attorney General

By:

A handwritten signature in cursive script, appearing to read "James R. Solomon, Jr.", written over the typed name.

JAMES R. SOLOMON, JR.
Chief, Opinions Division

JE/DES/eb39
0951N